

117. (322)

Edward Mac-Culloch, of Auchinguil, - - Appellant.

Janet Mac-Culloch, *Wife of the said Edward*, - Respondent:

The Respondent's C A S E.

JOHN Mac-Culloch deceased, the Respondent's Father, possessed an Estate in the County of *Galloway*, which enabled him to give his Children an Education equal to any in that Part, though it was not sufficient to afford large Portions to a Number of younger Children. The Appellant's Father, his first Cousin, possessed an Estate in the same County, Part whereof he settled on the Appellant his second Son.—The Appellant and Respondent from their near Relation, and the frequent Intercourse between the Families, were acquainted from their earliest Infancy.—The Appellant, after his Father's Death, resided at the House of his Sister, the Wife of Mr. Mac-Culloch of *Ardwall*, and the Respondent having been invited to live there, as a Friend and Companion of Mrs. Mac-Culloch, and to assist her in the Care and Education of her Children, their Acquaintance begun at an early Period of Life, improved by Degrees into a sincere and mutual Love and Affection; and in consequence of the Appellant's most serious and repeated Addresses a Marriage was privately concluded between them in *March 1750*, when they were both past thirty Years of Age. But as the Appellant's Estate was inconsiderable, and he had no House in which his Family could reside, and had then a Dependence on some Friends who might be displeased at a Match which brought him very little additional Fortune, it was judged proper to conceal the Marriage for some Time from their Relations.—On this Account the Solemnization of the Marriage, according to the Forms of the Church, was not performed, and was judged unnecessary, as People of their Age and Experience were not ignorant that by the Law and Usage of *Scotland* a Marriage may be valid by the Acts of the Parties notwithstanding the Omission of this Ceremony.—From this Period the Appellant and Respondent living in the same Family, cohabited together privately as Husband and Wife; but the Respondent soon proving with Child, it was thought proper she should remove from thence to her Mother's House at *Clary*, where the Appellant continued for some Time to visit her, and was received by her Mother and Sisters as her Husband, tho' the Marriage was not publicly divulged.—In the Month of *October* thereafter, when the Respondent was upwards of six Months gone with Child, it was agreed she should remove from *Clary* to the *Isle of Man*, where she might privately lie-in.—Accordingly the Appellant accompanied the Respondent thither, and having fixed their Residence in the Town of *Peeltoun*, they lived and cohabited together as Husband and Wife publicly, at Bed and Board, for six Months.—Here the Respondent was treated by the Appellant with remarkable Affection and Tenderness; she was visited at his Desire by the best Company in that Part; was attended and delivered by a Midwife called by him; and the Child was baptized by the Minister of the Parish: And on all these Occasions the Appellant acted and appeared as the Respondent's Husband.—After her Recovery she returned with the Appellant to her Mother's House at *Clary*, where it was agreed she should reside for some Time till the Appellant should build a House on his own Estate of *Auchinguil*.—Here the Appellant made frequent Visits for some Time, and was received and entertained in the Family as the Respondent's Husband.—The Marriage was now not only known to the Appellant's and Respondent's nearest Friends, but being publicly spoke off and believed, the Appellant received the Congratulations of his Friends and Acquaintance on that Occasion.—The Appellant about this Time treated with the Respondent's Brother for an Office he held in the Customs, and which he proposed to resign, in the View of the Appellant's succeeding him.—The Resignation of this Office was agreed to be made in Consideration of this Marriage, and Applications were accordingly made for obtaining the Office for the Appellant, which he soon after procured; but as he thought not by Means of the Respondent's Brother.—After this Period it was remarkable the Appellant discontinued his Visits to the Respondent, and after some Time he made no Scruple to disown his Marriage.

The Respondent thus deserted by one engaged by the most sacred Ties, who had for above two Years treated her with the greatest Affection and Tenderness, and acknowledged her as his lawful Wife, both in public and private, for some Time flattered herself, that the Principles of Honour would prevail over every interested Motive, and rescue the Respondent from the Distress she must suffer by a Breach of his Engagements.

The Respondent's Friends and Relations having in vain endeavoured to obtain that Justice and Satisfaction they desired, the Respondent was at length obliged to commence a Suit before the Commissary or Ecclesiastical Court of *Edinburgh* for establishing her Marriage.

The present Action.

The Summons or Declaration, according to the Forms of the Court, sets forth, That after a previous Courtship between the Appellant and Respondent, they were privately married in the House of *Ardwall* upon the 8th of *March 1750*; and the Summons after mentioning the Circumstances of their Cohabitation, and the Appellant's repeated Acknowledgements of their being married Persons, CONCLUDES, That it ought to be found and declared, that the Appellant and Respondent were actually married together; AT LEAST, that they ought to be deemed holden and declared married Persons in respect of the Appellant's repeated Acknowledgements, their Cohabitation together, and their being commonly holden and reputed to be married Persons, and that the Appellant should be decreed to adhere to her as his lawful Wife.

1. Aug. 1755.
Interlocutor of
the Commissaries
allowing a
Proof.

The Appellant gave in his Defences, denying every Fact and Circumstance relative to the Cohabitation and his acknowledging the Respondent as his Wife, and after some immaterial Proceedings, the Commissaries of this Date, "Before Answer allowed the Pursuer (Respondent) to prove her Libel, (Declaration) and all Facts and Circumstances relative thereto, and allowed the Defender to prove what is set forth in his Defences; and to both Parties a conjunct Proof anent the Premises, and granted Commissions for taking the Proofs in *Galloway* and the *Isle of Man*."

Proofs were accordingly taken by the Parties relative to the three following Articles.

1. The Relation between the Parties; their Ages, and the Character of the Respondent and her Mother.
2. The Appellant's Conduct and Behaviour previous to, and for some Time after his Marriage; his Reasons for concealing the same; his accompanying the Respondent to the *Isle of Man*, and there not only cohabiting with her as his Wife, but acknowledging the Child, upon occasion of its Baptism, as his lawful Son.
3. The general Report and Belief of the Marriage, after the Return of the Parties from the *Isle of Man*; the Appellant's visiting and being admitted at the Respondent's Mother's House as her Husband; his receiving the Congratulations of his Friends on his Marriage; his treating with the Respondent's Brother for a Resignation of his Office in Consideration thereof, and on no Occasion disowning the Marriage for above a Year after, or contradicting the common Belief and Report of his Friends and Acquaintance of his being married to the Respondent.

1. With respect to the Relation between the Parties, their Ages, and the Characters of the Respondent and her Mother.

It is proved by several Witnesses and admitted, That the Appellant and Respondent are second Cousins; and that the Appellant was thirty-six Years of Age, and the Respondent nearly of the same Age when the Proof was taken.

Printed Proof,
Page 36. Let. E.

As to the Respondent's Character, John Mac-Culloch of *Barholm* deposes, "That the Respondent has the Character of being an innocent, modest, and virtuous Woman."

Page 60. Let. G.

John Mac-Culloch, the Appellant's Brother, deposes,— "That he has been acquainted with her these twenty-four Years past, and never heard or knew any Thing prejudicial to her Character."

Page 47. Let. G.

Peter Agnew of *Dalreagle* deposes, "That he has had a general Acquaintance with the Respondent from her early Youth, at least for twenty Years backwards, and so far as ever the Deponent knew of her Character, it was extremely good, and never heard the smallest Thing to her Disadvantage."

And

- Page 30, 35, 57. And six other concurring Witnesses, all depose to the same Purpose.
- Page 62, 64, 5. As to the Respondent's Mother's Character, *Alexander Macklachlane* deposes, "That he has been long acquainted with the Respondent's Mother even since he was a Child, and from her Character he believes in his Heart she would not have permitted the Parties to cohabit together in her House unless she had believed they were married."
- Page 37. Let. D. "John Mac-Culloch of Barholm deposes, "That so far as he can judge he imagines the Respondent's Mother would not have permitted the Appellant and her Daughter to have cohabited together in her Family unless she had believed they were married Persons."
- Page 36. Let. F. "James Gordon of Balmeg deposes, "That he knows the Respondent's Mother to be a Woman of a good Character, and that he has been acquainted with her of a long Time, and does not think or believe, that she would have indulged her Daughter in any vicious Conduct."
- Page 58. Let. G. "William Gordon of Greenlaw deposes, "That from the Acquaintance he has of the Respondent's Mother, he believes that if she had not been convinced that the Appellant and Respondent were married together, she had not given them the Countenance he is informed she gave them in her own Family, after their Return from the Isle of Man, when the Deponent has been informed the Appellant made frequent Visits and slept with the Respondent."
- Page 63. Let. C. "Mrs. Boyd Wife of Mr. Boyd, Minister at Wigtown, deposes, "That from the Character the Pursuer's Mother has along borne, she is convinced, at least believes she would not have allowed the Appellant and Respondent to have cohabited together in her House, unless she had believed them to be married Persons."
- Page 66. Let. A. 2. With respect to the Appellant's Conduct and Behaviour previous to, and for some Time after his Marriage; the Reasons for concealing the same; his accompanying the Respondent to the Isle of Man, and there not only cohabiting with her as his Wife, but acknowledging her publickly as such.
- Page 86. Let. G. "Sarah Thompson, Servant in the House of Ardwall, deposes, "That she heard it talked in the Family of Ardwall, That the Pursuer had a Veneration for the Defender."
- Page 86. Let. G. "Mary Tagart, another Servant in the Family, deposes, "That she knows, That the Family imagined the Pursuer had a more than ordinary Respect for the Defender."
- Page 50. Let. D. And three other Witnesses depose, "That there was a Courtship between the Appellant and Respondent, while they resided at Ardwall in the Year 1749 and 1750."
- Page 83. Let. F. "Matthew Dore deposes, "That in a private Conversation between the Appellant and him, The Appellant told him, That the Respondent being so near her Time, he did not choose to trouble any of her Friends with her till such Time as he had a House of his own built to take her to."
- Page 91. Let. G. "Mr. John Watson deposes, "That Mr. Tedford having taken the Appellant to task by telling him, it was reported that the Appellant was not married to the Respondent; the Appellant answered, THAT IT WAS FALSE, and that his Reason for bringing the Respondent to the Isle of Man was, because he had no House, and he intended to build a House to take her to."
- Page 5. Let. E. "Hary Mac-Culloch deposes, "That he asked the Reason at the Appellant why he concealed his being married with the Respondent; that the Appellant told him he had good Reasons of his own; and on another Occasion the Appellant told the Deponent, That he proposed to take a House for the Respondent at Kirkcubright, but that she declined it, saying, she would live cheaper with her Mother for some Time, till he should get a House of his own upon his own Ground."
- Page 15. Let. C. "William Gordon deposes, "That he heard the Appellant's Friends, and particularly his elder Brother John Mac-Culloch of Torchouse and his Lady, were dissatisfied with the Report of the Appellant's being married to the Respondent, and on that Account he concealed from the Family of Torchouse the Visits he made the Respondent in her Mother's House, and deposes, "That he also heard, that their going to the Isle of Man, and being so long of owning the Marriage was to put off Time till the Appellant got a proper Settlement made at Auchingmill for their commodious living there in a married State."
- Page 45. Let. E. "James Gordon deposes, "That it was rumoured the Appellant concealed the Marriage on Account, as was reported, he gave out of disobliging his Friends."
- Page 46. Let. B. "Mrs. Dore Wife of Matthew Dore, Innkeeper in Peelton in the Isle of Man, deposes, "That the Appellant and Respondent came to their House in Harvest 1750, that next Day they set out to Douglass together, and about a Week thereafter the Appellant returned alone, and told the Deponent that he wanted a private Conversation with her and her Husband; that after Dinner, and the Company being retired, the Appellant told the Deponent, That his Friend in Douglass, with whom he intended HIS WIFE should stay, was dead, and that HIS WIFE being fond of her Company, he would take a Room for himself and her from the Deponent, and board with her; accordingly they made an Agreement thereanent, but told him she could not spare the Room for some Days; which he agreed to, and fixed upon a Day for their coming both together, but that for a Day or two after the Day fixed they did not come; and being interrogated whether or not the Appellant at making the above Agreement called the Respondent Mrs. Mac-Culloch or his Wife, deposes, That the precise Words were MY WIFE, and that she the Deponent would not have taken them into her House to sleep together, unless she had understood them to be married;—that upon their coming from Douglass they eat and slept together as Man and Wife, and behaved as such to one another in every respect, appearing to be as affectionate an Husband as ever she had seen; and that David Mac-Culloch, Brother to the Appellant, oftner than once, saw the Pursuer and Defender in Bed together, the said David having then lodged some Days in the Deponent's House:—That a short Time before Christmas the Appellant set out for Scotland, and returned in a short Time before the Respondent was delivered, which happened the latter End of January or beginning of February.—That the Respondent was delivered of a male Child, which was baptized in the Church of Peelton by Parson Wilks, and was called Moore Mac-Culloch, at the Desire of the Appellant himself, who gave for his Reason, that he had promised to his Brother Torchouse his first Wife, whose Surname was Moore, that his first Child AFTER BEING MARRIED, whether male or female, should be called after her; That John Watson, Merchant in Ramsay, and William Tedford in Peelton, now deceased, acted as Godfathers, and the Deponent as Godmother at the Baptism; that the Appellant was not present, nor is it customary, but that he was in Town, gave an Entertainment after the Baptism, and was himself present thereat;—That Mr. Tedford aforesaid, by the Appellant's Orders, got a Nurse for the Child, with whom the Defender agreed;—That the Appellant behaved in a most affectionate Manner towards the Respondent and the Child;—That after the Respondent was got well and churched, the Appellant set out for Scotland by the Way of Douglass, where he bought some Goods, which in their Passage from Douglass to Ramsay being seized, he the Appellant returned to the Deponent's House, and in a Day or two thereafter was arrested at the Instance of Messieurs Ross and Black, Merchants in Douglass, by Captain John Murray in Peelton:—That when Captain Murray arrested the Appellant as aforesaid, the Appellant and Respondent were going to Bed, and that the Respondent fell a crying, and the Deponent heard the Appellant ask of Captain Murray to allow him to go to Bed that Night with HIS WIFE who was lately delivered, and who might be the worse in case he was carried off; but which the Captain refused, as it exceeded his Powers, and the Respondent continued weeping all that Night;—That the Appellant soon found Bail, and was soon set at Liberty; and that they cohabited together as Man and Wife from that Period till their leaving the Island;—That several in the Place, some of Note and Fashion, during their stay with the Deponent, visited them, being made acquainted with them by the Deponent and others;—That some Time in March the Appellant and Respondent left the Deponent's House, and set out for Scotland together, the Respondent having staid altogether in the Deponent's House about six Months, and the Appellant having come and gone during that Period, and at no Time having been long absent;—That they left the Child behind them, desiring the Deponent and Mr. Watson to take care of the Child, and to visit him frequently;—That she believes the Appellant gave the Nurse some Money, and left some with her Husband to be given her, and that the Child died in the Month of June;—That the Appellant told the Deponent, that he had neglected to give timely Warning to his Tenants to remove, and that to raise a Process against them would cost him thirty Pounds,—wherefore he did not care to be obliged to the Respondent's Mother, or any of his own Friends to maintain HIS WIFE, as she was tender and unhealthy, but rather chose to bring her to the Island and pay for her, as it was a fine Air."

Mathew Dore, p. 2, &c. Capt. John Murray, p. 11. Mrs. Keen the Midwife, p. 12. John Watson, p. 13. Mr. Wilks the Minister, p. 26. Catharine Colline, p. 30. Elizabeth Corrington, p. 33. Page 64. Let. B. Page 62. Let. B. Page 55. Let. E.

Seven other Witnesses all give a positive and distinct Evidence as to the Particulars mentioned in the above Deposition, and the Appellant has admitted the Truth of the Whole.

3. With respect to the general Belief and Reputation of the Parties being married after their Return from the *Ile of Man*; the Appellant's visiting and being received at the Respondent's Mother's House as her Husband; his receiving the Congratulations of his Friends on his Marriage; his treating with the Respondent's Brother for a Resignation of his Office, and on no Occasions disavowing the Marriage for upwards of a Year thereafter.

Mrs. Boyd deposes, "That David Mac-Culloch, the Appellant's Brother, and the Deponent being in Company together, i.e. laid a Wager with the Deponent, that the Appellant and Respondent were not married, deposes, That the said David Mac-Culloch having gone to the *Ile of Man*, while the Appellant and the Respondent were there, and having returned thence, he told the Deponent that he had lost his Wager, FOR HE BELIEVED THE PURSUER AND DEFENDER WERE MARRIED."

William Gordon of Greenlaw likewise deposes as to this Particular.

Mrs. Minigen deposes, "That some Time after the Pursuer and Defender returned from the *Ile of Man*, the Deponent having heard a common Report in the Country of their being married together, the Deponent asked him how his Wife was, and said she was glad her Acquaintance was coming so near her, and that she intended to be in their House, and that Mr. Mac-Culloch made her a Bow and smiled; but cannot be positive that he made her welcome in Words, but took the Bow and Smile to mean so much; and deposes, That upon the common Report and Mr. Mac-Culloch's not refusing it, she was partly convinced that there was a Marriage between them."

Alexander MacLachlan, Merchant, deposes, "That after they came from the *Ile of Man* he then resided at *Clairy*, where the Appellant's Mother also resided; that he did see the Appellant more than once go to the Respondent's Mother's House, where the Respondent then resided; and at one of these Times Mr. Anderson, Minister of the Parish, said to the Deponent, that he was glad to see the Pursuer and Defender together; and further deposes, That he heard a common Report of the Parties having been married together at that Time."

Mr. Robert Nasmith deposes, "That about the Time the Appellant came to settle in *Kirkubright*, he was occasionally with him in a Tavern about some Business, "That at that Time there was a Rumour of the Appellant's being married to the Respondent; That the Deponent remembers he asked the Appellant for Mrs. Mac-Culloch, meaning the Respondent, and drank her Health, and the Appellant answered by thanking the Deponent, she was pretty well.—That about that Time the Respondent's Brother told the Deponent, that he and the Appellant were in Terms of Agreement with respect to the Appellant's succeeding him in his Commission in the Customs at the Port of *Kirkubright*, on Account of the Respondent's Sister."

Alexander M'Adam, one of the Witnesses called by the Appellant, deposes, "That after the Respondent left *Ardwall's* Family, and went to the *Ile of Man*, there was a common Report, both in the Family of *Ardwall* and in the Country about, That the Pursuer and Defender were married—That, after their Return from the *Ile of Man*, he heard by common Fame, that the Appellant and the Respondent's Brother were in Treaty about the Appellant's succeeding the Respondent's Brother in his Commission in the Customs, and that this Treaty was grounded upon the Supposition of that Marriage."

Other five Witnesses depose as to the common Report and Belief of the Marriage.

Grizel and Jean Mac-Culloch concur and depose, That the Appellant visited the Respondent for more than a Year after her Return from the *Ile*, and that the Nights the Appellant stayed he slept with the Respondent.

Henry Mac-Culloch, the Respondent's Brother, deposes, "That sometime after the Appellant and the Respondent came from the *Ile of Man*, the Deponent having given out that he intended to resign the Office of Tide-Surveyor, the Appellant wrote a Letter to the Deponent, which bears to have been at the Desire of the Respondent, desiring the Deponent to forbear treating with others till the Appellant should see him—That the Deponent understood this Request to be on Account of the private Marriage with his Sister: Deposes, That after receiving this Letter, the Deponent and Appellant met at *Kirkubright*, when the Appellant proposed to the Deponent, THAT HE SHOULD GIVE HIM THE ABOVE POST OR PLACE IN LIEU OF ANY PORTION THE RESPONDENT HAD A CLAIM TO, or Words to that Purpose—That, at another Meeting, he showed the Appellant a Letter he had wrote on the above Subject to Mr. Stewart of *Cattle-Stewart*, desiring that the Appellant should be preferred to succeed the Deponent upon his resigning; and for his Reason gave, That the Appellant was married to the Respondent his Sister—That he resigned the above Post about a Year after the above Communicing, and sometime thereafter, the Deponent, having met the Appellant, asked him if he was satisfied to take the Post, That the Appellant told him he would not take the Gift of it: Deposes, That about this Time the Respondent acquainted him, That the Appellant was beginning to relinquish the Marriage: And deposes, That he has been told, That the Appellant procured the Post by Lord Gallaway's Interest."

James Gordon of *Balmeg* deposes, "That in a Conversation with Mr. Mac-Culloch of *Tore-House*, the Appellant's Brother (after the Report of the Appellant and Respondent's Marriage) concerning the Respondent's Brother's disposing or selling the Post he enjoyed in the Customs, The Deponent heard the Appellant's Brother say, that Henry Mac-Culloch the Respondent's Brother might give it to his Brother-in-Law, whom the Deponent understood to be the Appellant."

The Appellant has not brought any contrary Evidence to disprove or invalidate any Particular of the Proof before stated.

The whole Evidence having been reported to the Court, the Commissaries directed Informations to be given in for both Parties with respect to the Import of the Evidence, and the Merits of the Question.

The Respondent, in her Information, insisted, That by the Law and Usage of *Scotland*, as established by the greatest Authorities, and by the uniform Determinations of the Courts, "The Marriage-Contract consists in the CONSENT of PARTIES, whereby they accept each other as Husband and Wife, whether by Words expressly; OR TACITLY BY MARITAL COHABITATION; OR BY ACKNOWLEDGMENT: And tho' THE PUBLIC-SOLEMNITY is introduced as a Matter of Order, yet IT IS NOT ESSENTIAL TO MARRIAGE, and there only arises from thence the Distinction of PUBLICK AND CLANDESTINE MARRIAGES."

That, upon these Principles, it had been solemnly adjudged, "That one's Acknowledgment of the Marriage to the Midwife, whom he called to his Wife, and to the Minister who baptized his Child, was sufficient presumptive Evidence without the Aid either of Cohabitation or of being held and reputed married Persons; and in another Case, the Acknowledgment of a Lady, tho' made in *Holland*, where she had retired to be delivered of a Child, That she was married, and that her Child was legitimate, was found sufficient to establish a Marriage—That, in the present Case, it appeared from the most undoubted Evidence, that the first solemn Engagements, and the Correspondence between the Parties in the Family of *Ardwall*, was the Effect of a sincere Love and mutual Affection contracted after a long and intimate Acquaintance—That Mrs. Mac-Culloch, the Appellant's own Sister, from the Character, equal Birth and Condition of the Respondent, and an Opinion of her own Brother's Honour, was persuaded that their frequent Interviews and Correspondence proceeded from matrimonial Engagements between Parties who were suitable Matches and near Relations to each other, otherwise she would not have permitted this Intercourse to go on—That it appeared, the ordinary Reasons for concealing Marriages, from an Apprehension of disoblighing Friends, or the Parties being unprovided with a proper Settlement, occurred in this Case; and that these were not the artful Inventions of the Lady, *ex post facto*, to excuse her Conduct; but were avowed and declared by the Appellant himself as the Reasons of this Secrecy, at Times when he had no Inclination to deny the Marriage—That the Parties retiring to a neighbouring Country, connected with the County of *Galloway* by daily Intercourse, and there cohabiting in the Character of Husband and Wife, without the least Reserve or Concealment from their own Countrymen and Friends, who had Occasion to see them, and to hear of their Manner of living; the Appellant there acknowledging the Respondent as his Wife, not to Strangers only but to his own nearest Friends; his expressing the most serious Affection and Concern at the Birth of a Child; his having the Child baptized as his lawful Son, and continuing to cohabit with the Respondent for many Months after the Birth in the most public Manner, afforded most clear and evident Demonstration of a previous Marriage, and the Appellant could not now be permitted to say he trifled or dissembled in making such deliberate and solemn Declarations of Truth, no more than if he had made Oath before a Magistrate in the *Ile of Man*, that he had been married in *Scotland*—That there was no Ground in Law or Reason to maintain, that these Acknowledgments of a Marriage were of no Effect, because made in a Country where the Law of *Scotland* does not take Place—That it is a Principle established by the Law of Nations, That Persons who are only occasionally,

and

The Respondent's Plea. Lord Stair's Institutions, p. 25.

Erskine's Institutions, p. 62. Case of Dr. Arrol, Feb. 1739. Forbes against Countess of Strathmore.

and without any Intention of fixing a Residence, in a foreign Country, are still subject to the Laws of their native Country, and all Contracts entered into by such Parties, according to the Law and Usage of their own Country, will be effectual when brought in question before the Courts of Law there—That the Appellant's Conduct and Behaviour after his Return from the *Ile of Man*, taken with the Chain of Circumstances and Arguments already stated, put this Matter beyond any Doubt—That for a considerable Time after his Return to Scotland, tho' the Report and Belief of his Marriage was frequent in the Country, he has not been able to prove, that, in one Instance, he contradicted this general Belief and Report; on the contrary, it is proved, he frequently resorted to and cohabited with his Wife in her Mother's House, where, according to the Belief of many concurring Witnesses, he would not have been received on the Foot of a dishonourable Commerce; when challenged by his Friends, who were displeased with the Marriage, he does not disown it; when complimented and treated by the Respondent's Friends and Well-Wishers upon the Foot of an acknowledged and notorious Marriage, he leaves them no Room to doubt of it; and after all this he enters into a Treaty with the Respondent's own Brother, with respect to an Office in the Customs, which he agreed to receive as an Equivalent for any Claim he had for the Provision to which the Respondent was intitled—That therefore, upon the whole, the Evidence of this private Marriage was more full and compleat than in any Case of the same Nature where a Question had occurred.

The Appellant's Answer.
From the Appellant's Information, p. 7.

The Appellant rested his Defence of there being no Proof of an actual Marriage in March 1750, as set forth in the Respondent's Libel or Declaration, and insisted, That the Parties had no Imagination of a Marriage before they retired to the *Ile of Man*; "That by the Respondent's Importunity, and his natural Tenderneis for her, he was prevailed on to alter his Manner, and put on the Disguise of a Husband for a short Time—That he soon discovered it was impossible to expect Accommodation or Civility, while he and the Respondent remained upon the Footing of two travelling Friends, as he had no Business to account for his own coming into the Island, far less attended by a female Companion, apparently with Child—That he was resolved to leave her in that Place, and return to Scotland for some time; and he was very willing, for her Sake, that they should pass for Man and Wife, without which she could neither expect to be well treated during his Absence, nor well attended during her in-lying; That this led him to cohabit with her, and from such Behaviour it was natural for the Landlord and his Wife and the People of the Place, to believe that they were truly Man and Wife; That from the same Motive he attended the Birth and Baptism of the Child, SEEMINGLY AS A HUSBAND AND LAWFUL FATHER—He sent for and paid the Midwife, bespoke the Godfathers and Godmother, without discovering that the Child was illegitimate, whereby the Child's Name was entered in the Register of the Parish, without being called a Bastard—And that from the whole of this Behaviour, it was no Wonder that the People of that Place concluded that they were married Persons, and spoke of them as such; And when he had brought himself once under this Disguise, it was impossible for him to contradict the Opinion they had taken up, or the Appellations they were pleased to give them of Man and Wife; and their Manner of Speech, in calling the Respondent Mrs. Mac-Culloch and his Wife, might naturally lead him upon Occasions to speak of her in the same Stile—That therefore, as there was no Pretence of a Marriage when the Appellant and Respondent retired to the *Ile of Man*, and after their Return as there was no Cohabitation between them as Husband and Wife, there was no sufficient Evidence to establish a Marriage in this Case—That their Cohabitation and Behaviour as Husband and Wife, while in the *Ile of Man*, could not be taken into Consideration in the present Question, as it was meant and intended by both Parties for no other Purpose but as a Cover; and that, at any Rate, such Cohabitation in a foreign Country could not establish a Marriage contrary to the Laws of that Country."

Appellant's Information, p. 22.

18. Aug. 1758.
Interlocutor of the Commissaries.

Upon advising the Cause, the Commissaries, of this Date, pronounced the following Interlocutor; "The Commissaries having considered the Libel, Defences, Answers, Replies and Duplies, Proof adduced for both Parties, together with the State of the Process and whole Proceedings in the Cause, they find the Facts, Circumstances and Qualifications proven, not relevant to infer Marriage, and therefore assolve the Defender, (i. e. absolve the Appellant) and decern."

The Respondent applies to the Lords of Session for a Review of the Commissaries Interlocutor.
27. Feb. 1759.
Interlocutor appealed from.

The Respondent presented a Bill of Advocation to the Lords of Session, complaining of the Interlocutor of the Commissaries above recited, and praying their Lordships to remove the Cause from the Commissaries to the Court of Session, and to remit the same with Instructions to alter their Interlocutor, and to declare the Marriage.

Answers were put in for the Appellant to this Bill of Advocation, to which Replies having been made for the Respondent, and Duplies on Behalf of the Appellant, the Lord Ordinary reported the Question to all the Lords, and, upon their Opinion, he, of this Date, pronounced the following Interlocutor; "After advising with the Lords refuses the Bill, but remits the Cause to the Commissaries with this Instruction, That they find the Marriage proven."

The Appellant has appealed to your Lordships from the aforesaid Interlocutor of the Lord Ordinary of the 27th of February 1759; but the Respondent humbly hopes the same will be affirmed, and the Appeal dismissed with Costs for the following among other,

R E A S O N S:

- I. By the Law and Usage of Scotland Marriage is compleated by the Consent of two Persons agreeing to accept each other as Husband and Wife—This Consent must appear, either by a Contract and Agreement in Words; by Cohabitation as Husband and Wife, and being reputed such; or by the Acknowledgment of the Parties, expressed in Presence of Witnesses; or implied from Facts and Circumstances—A Marriage thus constituted cannot be dissolved, tho' the Parties should concur in making the most solemn Declarations contrary to their former Acknowledgments—The Celebration of Marriage, according to the Forms of the Church, adds no Validity to the Contract, being introduced merely as a Matter of Order and Decency—When these Forms are complied with, the Marriage is called public; when they are omitted, the Marriage is said to be private or clandestine, and the Parties are only subject to the Penalties imposed on clandestine Marriages, but the Marriage is valid.
- II. In the present Case, the Marriage between the Appellant and Respondent is established both by Cohabitation as Husband and Wife, and by the Acknowledgment of the Parties, either of which taken separately would have been sufficient—The Equality and Propriety of the Marriage, and the Cohabitation and Acknowledgment of the Parties, are proved by the most convincing Evidence; it being remarkable, That the Appellant has been unable to disprove or invalidate any Fact or Article of the Respondent's Proof by the many Witnesses he examined, and the utmost Art he has used—The Respondent's unblemished Character is proved by nine concurring Witnesses—It is proved, and acknowledged, that the Parties were nearly related, were acquainted from their earliest Infancy, and were both past thirty Years of Age when this Marriage was contracted—It appears from the Testimony of five concurring Witnesses, That the Appellant made his Addresses to the Respondent whilst they resided in the Family of *Ardwall* in 1749 and 1750, and that at this Time the Courtship was carried on between them—It is proved by five Witnesses, That the Reason given by the Appellant for concealing the Marriage was, because he had no House on his Estate, and intended to build a House for the Reception of the Respondent and his Family; and three of these Witnesses give a distinct Testimony, That the Appellant himself expressed the Reasons in these Terms—The Cohabitation of the Parties as Husband and Wife for six Months in the *Ile of Man*, and the Appellant's solemn Acknowledgments of the Respondent as his Wife on all Occasions, is proved by eight concurring Witnesses, and the Appellant owns every Fact alleged as to this Article in his Information given in to the Court, tho' he endeavours to palliate his Conduct by a very strange and unnatural Construction—It appears by the Testimony of two concurring Witnesses, That the Appellant's own Brother *David* believed and acknowledged the Appellant's Marriage after his Return from the *Ile of Man*—And three other Witnesses give Evidence of the Appellant's own Confession of the Marriage—It is proved by five concurring Witnesses, That the Respondent's Mother, upon the Belief and Persuasion of her Daughter's Marriage, admitted and received the Appellant into her House as the Respondent's

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dent's Husband long after his Return from the *Isle of Man*—It is proved by two Witnesses, That the Appellant entered into a Treaty with the Respondent's Brother, with Respect to an Office in the Customs, to be given him in Consideration of this Marriage: And, finally, it is proved by the Evidence of eleven Witnesses, That the Appellant and Respondent were believed and reported to be married Persons for above a Year after their Return from the *Isle of Man*; and it does not appear, that the Appellant, on any Occasion, contradicted this universal and public Report, till a long Time after, when he totally withdrew himself from the Respondent's Company, and disowned his Marriage.

Obj. 1. The Facts and Circumstances, previous to the Parties retiring to the *Isle of Man*, and what passed after their Return from thence, can alone be taken into Consideration in the present Question—These are insufficient to constitute a Marriage, as there was no public and open Cohabitation in the Character of Husband and Wife, or any serious or direct Acknowledgment of the Appellant during these Periods—Their Cohabitation in the *Isle of Man*, and the Appellant's there acknowledging the Respondent as his Wife, can have no Effect, because these were manifestly intended as a temporary Cover and Disguise, and could not constitute a Marriage according to the Laws of that Island.

Ans. 1. The Proof, in this Case, includes a Period of two Years and upwards—The whole Chain of Facts and Circumstances occurring in that Period, is to be taken as one Act; as the same Cause gave Rise to the whole, the same Parties were concerned, and only one Point is to be established from the whole taken together—The Conduct and Behaviour of the Parties in the *Isle of Man* was a Consequence of what happened before their retiring to that Place—The Avowal of a Marriage there was consistent with a Plan of Secrecy, as there was no apparent Hazard of a Discovery for some Time; but most certainly the Appellant, who was ignorant of the Laws of that Island, with Respect to Marriage, was then honest and sincere in his Declarations and Acknowledgments; and from these there arises a clear and demonstrative Evidence of his previous Engagements with the Respondent, whom he then treated as his lawful Wife, and whom he did not forsake for upwards of a Year afterwards.

Ans. 2. The casual and temporary Abode of the Appellant for six Months in the *Isle of Man* cannot vacate the Deeds done, or the Engagements entered into, during that Period—The Parties having their fixed Residence in *Scotland*, where their Fortunes and Connections lay, were still subject to the Laws of that Part of the Kingdom—It is not controverted, that such Cohabitation and Acknowledgments of Marriage, as passed between the Parties in the *Isle of Man*, would have been sufficient to constitute a Marriage, if they had then resided in *Scotland*—This Cohabitation, and these Acknowledgments, did not arise from a necessary Compliance with the Laws or Customs of that Island, but were free and voluntary; and as they passed between the Subjects of *Scotland*, and are to be judged of according to the Laws of that Part of the Kingdom, it is in vain for the Appellant to take Shelter under the Laws of the *Island of Man*, thereby to release himself from his most serious and deliberate Engagements.

Ans. 3. The Appellant has not proved, that, by the Laws of the *Isle of Man*, such Cohabitation and Acknowledgment would not constitute a Marriage.

Obj. 2. The Respondent, in her original Libel, or Declaration, set forth "That the Parties were privately married in the House of *Ardrwall* on the 8th of *March 1750*."—As she has failed in the Proof of this material Article, and now acknowledges no such Marriage was celebrated according to the Forms of the Church, she cannot be permitted to resort to other Facts and Circumstances, so as to establish a Marriage.

Ans. It is the known and invariable Practice of the Commissary Court to alledge an actual Marriage in the Declaration or Libel; but the Respondent never undertook a Proof of this Article; on the contrary, in her Answer to the Appellant's Defences, (before any Proof was allowed) it is said, "As she was induced to enter into this Marriage (trusting to the Appellant's Honour) without any Witnesses being present, so she did not propose to bring any Proof of the Marriage itself."—As therefore this was no essential Part of the Respondent's Declaration, the Failure of the Proof of this Article can have no Influence on the present Question—She set forth all the material Facts and Circumstances, now in Evidence, and from thence she properly concluded in her Declaration, "That they ought to be holden and declared married Persons, in respect they had cohabited together; had treated, entertained, owned and acknowledged each other as such, and were taken and reputed to be married Persons."

III. The Appellant's principal and only Defence is an Admission, That he dishonoured a Relation of equal Birth and Character in Life; but he asserts that he cohabited with her as a Husband, and acknowledged her to be his Wife merely to cover her Shame.—This Assertion may be set up as a Defence on every Occasion, where the Celebration of Marriage cannot be clearly proved.—But no Court can with Safety permit a Person to derive any Benefit from such a Defence.

C. YORKE.

AL. WEDDERBURN.

Edward Mac-Culloch, of Au- } Appellant.
chinguil, - }

Janet Mac-Culloch, Wife of the } Respondent.
said Edward, - }

The Respondent's C A S E.

To be heard at the Bar of the House of Lords on
Monday the 14th of May 1759.

16 May

ordered and adjudged that
the Respondent be divorced
and the said Janet be
discharged and that the
Bill of Divorcement be
absolutely refused

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